Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The
Ohio Court Of Appeals For The
Seventh Judicial District

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER DUE PROCESS IS DENIED THE ACCUSED WHEN DESPITE THE LACK OF A SUBSTANTIAL BASIS FOR CREDITING RANK AND UNCORROBORATED HEARSAY THE TRIAL COURT DENIES A MOTION TO SUPPRESS.

II

WHERE THE RECORD SHOWS THE ALLEGED INFORMANT WAS RECRUITED AND PAID BY THE POLICE AND HIS ACTIONS ORCHESTRATED BY THEM, CAN HE THEN BE REGARDED AS AN AGENT OF THE AFFIANT AND AS SUCH THE DEFECTS IN HIS CREDIBILITY IMPUTED TO THE AFFIANT?

III

WHETHER DUE PROCESS WAS DENIED WHEN A TRIAL COURT (FOR AUGHT THAT APPEARS) ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES AND WHEN HE CREDITED A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY EVIDENCE, MOST OF IT REMOTE, IN HIS DETERMINATION THAT THE AFFIDAVIT SET FORTH PROBABLE CAUSE.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Lester Scott, respectfully prays that a Writ of Certiorari issue to review the judgment of the Seventh District Court of Appeals, which judgment became final on July 1, 1998, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Opinion of the Ohio Court of Appeals, against which this Petition is directed, was issued on March 9, 1998. This Opinion is designated **Appendix "A", pp. A1 to A18**, in the Appendix to this Petition. The Entry of the Ohio Supreme Court denying further appellate review was entered on July 1, 1998, the critical date herein. It is designated herein as **Appendix "B", p. A19**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio, as indicated above, was entered on July 1, 1998. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fourth Amendment, United States Constitution;
2. Fifth Amendment, United States Constitution;
3. Sixth Amendment, United States Constitution;
4. R. C. of Ohio, §2923.24 ;
5. R.C. of Ohio, §2925.22 ;
6. Rule 12, Ohio Rules of Criminal Procedure;
7. Rule 41(e), Ohio Rules Of Criminal Procedure.

STATEMENT OF THE CASE

The Fourth Amendment issues in this case were raised in petitioner's *Motion To Suppress* filed pre-trial under favor of **Rule 12, Ohio Rules of Criminal Procedure**. The Motion was denied and the issue was raised again in the appeal to the Ohio Court of Appeals which affirmed the denial of the Motion.

In so doing, the Court of Appeals expressly held:

(1) The affidavit supplied sufficient information for concluding that probable cause existed.

(2) That "appellant was incorrect in this primary assertion that he has shown the informant's statements to be false" and that this was so because, although unimpeached, indeed not even challenged, "it ... [was] obvious the trial judge did not find Ms. Scott's or Ms. McGauley's statements credible" and for that reason "appellant did not meet his [Frank's] burden of proof".

(3) That despite the contention any statements made by the alleged source should be imputed to the affiant because he was solicited and paid, the appellant failed to show that the affiant himself misrepresented the truth in his affidavit.

The relevant facts with reference to the federal questions sought to be reviewed are easily stated. Petitioner was indicted for a drug possession charge that surfaced in the wake of his arrest and the searches herein being challenged. Specifically he was charged with possession of a controlled substance, to-wit: cocaine, in violation of R.C. of Ohio, §2925.03.

In our case, the critical fact that must be reckoned with is the rank hearsay statement, attributed to an alleged informant, that there were drugs on the premises. As to this statement in the Affidavit in which it was said a sale had been made within the past seventy two (72) hours, the evidence is in serious and irreconcilable conflict. One officer says that an alleged informant had simply noted (as though in passing and apparently almost as an afterthought) that there were drugs on the premises, which version conflicts with the other affiant's version - - as shown

below.

Of no mean significance here, there was nothing set forth in the Affidavit that provided any corroboration, none whatsoever, for this alleged tip. So postured, it can easily be understood why a statement in an Affidavit that the informant had helped the police in the *recent* past, or a statement that the police had conducted surveillances that corroborated, by actual observation, some material averment (or averments) attributed to the informant in the Affidavit, can be of considerable significance in a probable cause equation. But in this case, the *recency* element can hardly be said to have been met. Additionally, the information previously supplied was shown to have been quite nebulous. Distilled the information had supposedly confirmed that two named individuals the police were investigating were simply involved with drugs. Further, this informant was not only recruited (**Tr., p. 33**), he was actually paid for services rendered (**id., pp. 35-36**). Also, he was obviously assured he would never have to testify (**id., pp. 18-19**).

Likewise significant here is the fact of the total lack of detail or specificity in the alleged hearsay tip. For example, had the alleged informant provided some particularized distinguishing characteristics of the apartment, its contents and the like, at least that would have been something. In this case, of course, the details supplied in the Affidavit all related to hearsay recitations and what can only be said was the naked opinions of the affiants - - and the informant.

Granted most of the arguments made in this *Petition* were made to the trial Court and apparently rejected by him. Because these arguments are clearly applicable here, they are repeated almost verbatim. Here the Court should understand counsel precisely contended to the trial Court, which contentions were confirmed by the Court of Appeals, that:

> **One**, there is no verifiable way the State can demonstrate the dates of the various contacts the

alleged informant supposedly had with the affiants and was said to have contributed the information attributed to him by the affiants.

Two, with reference to the alleged complaints concerning drug activity on the premises searched and as to the surveillance supposedly made, no record of these alleged events can be produced.

Three, there is nothing set forth in the Affidavit which informed the Magistrate of either, the informant's [extensive] criminal record or of his motivations. If his actions were done in hopes of compromising charges involving himself, clearly this should have been indicated to the Court.

Four, no indication as to the source of the funds supposedly used or if official funds were used, no record demonstrating this to be the case ... [would be] forthcoming. Additionally, there was no reference to the fact that the alleged "informant was paid $20 for his services".

Five, there is no meaningful Record of any interviews conducted with this informant in connection with any aspect of this case.

Other critical facts, to a considerable extent, are aptly summarized in the following excerpts from the Affidavit:

* * *

"3. Beginning in the month of January, 1994, and continuing to the present date, *Officers have received intelligence information from the P.O.S.S.E. Unit comprised of Youngstown Police Officers,* that Lester and Alex Scott engaged in large scale drug sales from 1225 Otis, #254 & 255 and 1183 Otis, #261. Included in said intelligence information, the P.O.S.S.E. Unit reported that the Scotts are using several look outs *** who are

equipped with Realistic two way radio head sets to broadcast to apartments, 254, 255 and 261, the arrival and departure of drug buyers and Police Officers.***"

* * *

"5. *During the week of November 01, 1993*, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 1225 Otis #254 under the controlled conditions to wit: Officers met with and searched the informant with negative results. Officers the (sic.) kept the informant under constant observation to and from the location. Upon returning, the informant turned over to Officers, one baggie containing one rock of crack cocaine."

"6. *During the week of March 14, 1994*, Officers Patton and Russo met with the informant and made a purchase of crack cocaine from 1225 Otis, Apt. #254 under the same controlled conditions described in the previous paragraph. Upon returning, the informant turned over to Officers, one baggie containing crack cocaine."

"7. The cocaine purchased during the week of November 01, 1993, was made from a F/B subject, described as 5'1", 120 lbs., age 23, known to the informant as, Crystal Scott. The cocaine purchased during the week of March 14, 1994, was made from a F/B subject, described as, 5'5", 160 lbs., age 50, known to the informant only as Bert."

Appendix "A", Opinion, pp. A5 - A6. (Emphasis supplied.)

Again, we have the Court ruling that "a reliable informant and a member of the P.O.S.S.E. Unit had both advised officers drugs were being sold from the premises" (**id., p. A11**) and that

"the officers . . . had conducted random surveillance and had observed activity that is consistent with drug sales" (**id., p. A11-12**). This showing, along with the officers' statement that an alleged reliable person told them he had twice purchased drugs from that location and had seen "cocaine on the premises" (**ibid**), was said by the Court to make for "a substantial basis for concluding probable cause existed" (**ibid**). The above ruling was made in spite of the Court having also concluded:

> "the affiants did not document their [alleged] surveillance[s], failed to get a written statement from their [alleged, arguably phantom] informant and could not specifically state who from the P.O.S.S.E. Unit relayed the information that drug sales were being conducted on the premises."

Id., p. A12. Unexplainably, this cogent finding the Court used as a premise for its further finding that "appellant neither proved that any statement in the affidavit was "false, nor that the affiants made a false statement intentionally or with reckless disregard for the truth." (**Ibid**.) Also, it should be noted the Court's specific reference to the "affiants" not having been shown to have made a false statement (**ibid**), fully demonstrates the Court simply failed to reckon with one of our most central contentions. This is so although this argument had been specifically noted by the Court in its recognition of the basis for our reliance on **United States v. McAllister, 118 F.3d 1412 (7th Cir., 1994)**.

Additionally, it seems clear enough that the Court rightly recognized, as we do, that credibility resolutions are for the trier-of-fact. And, we concede that "deference must be given the findings of the trial Court" who is entitled to believe or disbelieve any witness" (**Appendix "A", Opinion, p. A13**). But these tenets do not mean the finder-of-facts can, with impunity, jump from a failure to believe a particular witness' testimony to the conclusion that the reverse of what the witness testified to must be true. Yet, this is precisely what was imputed to the trial Judge

in the Opinion.

Indeed, in this case we had the alleged (non-testifying) police agent being credited with having said he purchased drugs from two named individuals on isolated occasions. Yet, the two individuals credited with making the sales testified this never happened. So postured, given that the trial Court refused to require (despite the defense request) the disclosure of the alleged source, the issue came down to whether the hearsay declarations of a non-testifying declarant alone were sufficient to not only impeach all contrary evidence, but to establish its own validity. With this being so, nakedly telling us, as the Court does, that the "trial Court had [hearsay] evidence before it, through the affidavit of Officers Patton and Russo [which showed they had been told] that Ms. Scott and Ms. McGauley had sold drugs to the informant from the premises" **(id., p. A13)**, hardly seems to be an appropriate response.

Also significant here, given the Court's critical ruling that the Magistrate had a substantial basis for crediting the information supposedly supplied by the source as to the two alleged sales and to his supposedly having stated he had seen narcotics when he made his second purchase, said to have been within the past 72 hours **(id., p. A6)**, is the testimony as to the alleged surveillances:

> Q. So that what you're telling the Court is that of the 40 some odd times that you drove past this house, you saw one car that arrived that had a person in it that you came to know?
>
> A. That I came to know, yes.
>
> * * *
>
> Q. ... So what that is saying is that you saw some person[s] going and coming; you don't know what their purpose was, and you don't know who they were?

A. That's correct.

Q. You didn't put that in your affidavit, did you?

A. No, I did not.

Q. What you put in your affidavit was language that tended to suggest that these people were entering those premises for the purpose of purchasing drugs, right or wrong?

A. That's correct.

Tr., pp. 12-14.

With reference to the so-called "intelligence" supposedly given the affiant-officers by the so-called "P.O.S.S.E. Unit," when asked if they had simply passed on rumors, the officer's pathetic response was: "... I don't know. I have to take what they pass to ... they give me [sources] information." **Id., p. 15**. As to the cocaine said in the Affidavit to have been seen by this alleged source on the premises during the past 72 hours, in addition to saying he did not ask how much had been seen, the affiant testified:

Q. ... On the 18th [the day the Affidavit was written] you allege that within the past 72 hours he made a purchase?

A. That's correct.
In the Affidavit I said that, yes.

Q. Now are you saying that the allegation that he had seen cocaine on the premises in the past 72 hours is a reference to the cocaine he purchased during the week of March 14?

* * *

A. Yeah. You're saying it happened at the same time?

Q. Right.

A. I'm saying, yes it did. However, he ... the informant advised myself there was more cocaine present in the house other than what was purchased.

* * *

Q. Find the portion in there where you advised the Court that ... the informant had seen cocaine on the premises other than that which he purchased? Take your time.

A. It's item – No. 12 simply states the informant has been to No. 254 in the past 72 hours an[d] observed cocaine on the premises. It doesn't make a distinction.

* * *

Q. Right. Now ... how can the Magistrate, reading this in a realistic fashion, come to the conclusion that the informant made a purchase during the week of 3/14 and also saw additional cocaine on the premises? How can you get that out of those allegations?

A. I don't know how the Magistrate would get it, I wrote it how I felt it was.

Id., pp. 23-27.

Next, the other affiant, Officer Russo, testifying to this same event, gave equally incredulous testimony:

Q. In other words, he observed the rock of cocaine [that he supposedly had purchased]?

A. That's correct. That was the buy.

* * *

Q. Now in the Report that you wrote up involving that transaction, did you put in there that the ... informant had seen [other]

cocaine on the premises?

A. No.

* * *

Q. You knew you had to convince the Judge that was issuing the warrant that there was reason to believe there was some cocaine on the premises when the search warrant was to be executed....

A. Yes, sir.

Id., pp. 53-63. The above testimony is augmented by questions asked by the Court:

THE COURT:	Were you able to verify the fact that cocaine was purchased from Crystal Scott on one occasion and from Bert on another? Was there any way for you to verify that, or did you have to rely on the informant to give you that information?
THE WITNESS:	We had to rely on the informant.
THE COURT:	There was no observations of those person[s] on those dates, is that correct, by you?
THE WITNESS:	Physically, no.
THE COURT:	By you or other officers?
THE WITNESS:	No sir.
THE COURT:	Had you ever observed them [i.e., Crystal and Bert] on the premises before?
THE WITNESS:	Me personally, no.

Id., pp. 70-71.

Here again it should be noted the Court of Appeals simply refused (rather brazenly, as we see it) to reckon with the fact that the affiants withheld from the affidavit critical facts relative to any meaningful assessment or evaluation of their alleged source. The non-disclosed information in this case was that the alleged source had a felony record (two convictions) and a "misdemeanor record" (**Tr., p. 33**). Also, the alleged "reliable" tag placed on the source related to very stale events that involved only peripheral information concerning two other individuals. Also, the fact that this informant was solicited and paid was likewise conspicuously absent from the affidavit. These details magnify the hollowness of the Opinion's repeated indications that the Judge totally disbelieved the specific denials made by those who were credited by the alleged source with having made the two drug sales in this case.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This appeal, in a drug possession case, brings to the Court issues that have not been appropriately addressed by any of the Ohio Courts below. Simply put, aspects of the Court of Appeals' Opinion reflect the rather patented penchant most Ohio Judges have long had for gospelizing almost anything and everything a police officer says in these swearing contests with mere citizens. Here, however, in this case it is most obvious the findings actually made clearly show that the police acted improperly. It is for this reason the critical rulings of the trial Judge and the Appellate Court cannot survive meaningful scrutiny. Since the Fourth Amendment issues resolved in this Opinion will affect others in our State, the failure of the Ohio Supreme Court to step in and resolve this issue is not only unexplainable and indefensible; it is also unacceptable as well.

At the heart of the contentions made below, as we see it, is the well known, indeed undeniable, fact "that lies about the

existence of an undisclosed informant and his reliability are easy to tell yet most difficult to uncover". **Commonwealth v. Lewin, 405 Mass. 275, 542 N.E. 2d 275, 276 (1989)**. Also see **State v. Hunt, 22 Ohio App. 43 (Cuyahoga County, 1984)** and **State v. Dodson, 43 Ohio App. 2d 31 (Cuyahoga County, 1974)**. The point here being that it is undeniable that the police in Ohio are as good and as bad as police elsewhere. Yet in the years since **Franks**[1] and **Gates**[2], both *supra*, our courts have found it almost impossible to view a search warrant affidavit as being insufficient or to find that a **Franks** violation occurred. The reason, of course, could not be more obvious - - especially if it is a drug case - - even one where a paltry sum of drugs, if any, were actually found - - the case here.

Since it is truly unrealistic to believe that all Affidavits submitted to Ohio Judges are invariably sufficient and that the contrast between the true facts and their sworn averments are all insignificant, it follows that while there was, and still is, a need for our Supreme Court to provide us with a recent precedent that demonstrates the Fourth Amendment is still alive and well in Ohio and is worth preserving. The existence of this need is what makes this case one that truly cries out for satisfaction. This follows because the Affidavit in this case, upon inspection by anyone who is reasonably-well informed, simply cannot pass muster.

Granted counsel is convinced that at least in Ohio, the "war on drugs" has virtually eliminated in its wake the Fourth Amendment. But surely that does not mean that all a police officer has to do is ask for a warrant and it will be given. Yet this is what happened here. Because the Affidavit in this case is so clearly deficient and because the Courts below seem so clearly

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[1] **Franks v. Delaware, 438 U.S. 154 (1978).**

[2] **Illinois v. Gates, 462 U.S. 213 (1983).**

indifferent to the cogent arguments made by the petitioner, the arguments made below, if invalid, should be dealt with by this Court and be expressly repudiated - - as arguably they should have been by the Courts below.

ARGUMENT NO. I

DUE PROCESS IS DENIED THE ACCUSED WHEN DESPITE THE LACK OF A SUBSTANTIAL BASIS FOR CREDITING RANK AND UNCORROBORATED HEARSAY, THE TRIAL COURT DENIES A MOTION TO SUPPRESS.

Granted the Affidavit in this case sets forth that isolated drug sales of (a) "one baggie containing one rock of cocaine" during the week of *November 1, 1993*, and (b) "one baggie containing crack cocaine" during the week of *March 14, 1994* had occurred on the premises. Aside from the fact of more than one hundred days between the indicated sale dates, the alleged sellers in these transactions both *denied* these sales occurred. Further, it was alleged and shown that no one could have ever mistaken Crystal Scott (and certainly no one who claimed to know her as one of the informers would have described her) as being 5'1", 120 lbs., and age 23 as was alleged in the Affidavit. Additionally. it was specifically alleged that, as is often the case with police officers, the officers created these alleged informants out of whole cloth. This police officers are known to do. Cf., **State v. Hunt, 22 Ohio App. 3d 43 (Cuyahoga Cty., 1984)** and **Massachusetts v. Lewin, 405 Mass. 275, 542 N.E. 2d 275 (1989)**.

Our points here are well made once it is understood that the alleged sources in this case, including the alleged P.O.S.S.E., did not provide a single verifiable detail. This brings us to the heart of our criticism of the assailed conclusions by the Courts below that seems clearly to say that a Judge's decision to issue a warrant is virtually, if not actually, impervious to assailment as being deemed flawed. Judging from the paucity of cases in this

State (the home of **Mapp v. Ohio, 367 U.S. 643 [1961], Beck v. Ohio, 379 U.S. 89 [1964] and Smith v. Ohio, 494 U.S. 541 [1990]**), that have actually found a Search Warrant Affidavit to be insufficient, the trial Court's position in this regard is really understandable. This is so because Ohio has long been viewed as a prosecutor's paradise, especially where the officers have a warrant. See **State v. Hunt, 22 Ohio App. 2d 43 (1984), State v. Dodson, 43 Ohio App. 2d 31 (1974)** and **State v. Young, 185 N.E. 2d 33(1963)**.

Be all that as it may, there are several considerations here that should not be overlooked, either by counsel-opposite or the Court. To begin with, the affidavit in this case contains references, not only to the alleged source who made the isolated purchases while supposedly inside the premises, but to other alleged sources. These include rank hearsay information supposedly supplied by a police organization dubbed the P.O.S.S.E. and others. The central point recognizes that information from sources (particularly when it is essential to a finding of probable cause - - the case here) must meet certain constitutional standards of reliability before it can ever be considered in any probable cause equation.

On this point, it should be noted that this Court in **Franks, supra**, actually addressed one of the problems here. It did so when it declared the "police [can] not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity" (**438 U.S., at 164, n. 6**). With this being so, even if these affiants filed their Affidavit in good faith *and* the Affidavit correctly reflected what they had ben told by the source, the defense contentions as they were structured required findings by the trial Court, is that these considerations were insufficient to carry the day.

ARGUMENT NO. II

WHERE THE RECORD SHOWS THE ALLEGED INFORMANT WAS RECRUITED BY THE POLICE AND HIS ACTIONS ORCHESTRATED BY THEM, FOR ALL INTENTS AND PURPOSES HE MUST BE REGARDED AS AN AGENT OF THE AFFIANT AND AS SUCH HIS (THE SOURCE'S) CREDIBILITY MUST BE APPROPRIATELY ASSESSED.

In this case, it is most significant that this is not a case where a police officer-affiant relied on information supplied to him in bad faith by a citizen-informant. Rather, this is a case where an alleged informant (if he actually exists) arguably could not be regarded as a mere citizen-informant. The effect of such a finding would require, if the statements about the informant were false, that they be imputed to the affiant himself. See **United States v. McAllister,**[3] **18 F. 3d 1412 (7th Cir. 1994)**. The particular point here being made is truly magnified by the following cogent testimony that was provided by Officer Patton (one of the affiants):

Q. When he made that purchase, did you debrief him after that transaction?

A. Yes.

Q. And did he write out a statement?

* * *

A. No, the informant didn't write out a

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3 **McAllister** makes the cogent point that where the alleged informant is acting . . . as an agent of the officers, his false statements can be imputed to the officers (**id., p. 1417**). Clearly then the holding here that **Franks** requires a showing that "the affiant made ... [the] false statements" (**Appendix "A", Opinion, p. A 12**) is at odds with this thesis.

statement.

Q. Why not?

A. Because I didn't feel it was necessary. *The informant is not a cooperating witness in this case.*

* * *

Q. What do you mean by he's not cooperating? Did you send him into some premises to make a purchase - - he's not cooperating with you?

A. *He's not cooperating in the sense that he's going to give verbal testimony in the courtroom against the individual he made the purchase of narcotics from.*

Tr., pp. 18-19. (Emphasis supplied.)

Another critical point in this mix stems from the fact that the alleged informant (who reportedly says he purchased drugs on the premises searched and who *reportedly* told the affiants there were additional drugs on the premises) was not only paid (**Tr., pp. 28 & 34**), his actions were directed by the officers who (if they are to be believed) actually orchestrated his conduct. So postured it could not be any clearer that this alleged person was indeed acting as a police-agent at all of the relevant times in this case. See **United States v. Koenig, 856 F.2d 843, 847 (7th Cir. 1988)**. Also see **United States v. Pritchard, 745 F.2d 1112 (1984)**.

Even this is not all. It was also established here that clearly this informant's conduct can be contrasted with that of those informants who assist the police to further their "own interest in hope of increasing [their] chances of receiving favorable treatment in the handling of [their] own pending drug charges" (**McAllister, 18 F.3d at p. 1418**). Rather, if an informant existed, clearly his purpose was to assist the police, a service he performed for pay. With this being so, the fact that it

was shown the informant lied requires that the lies told by him must be imputed to the affiants.

Clearly then this case pinpoints critical flaws in the trial Court's "findings." Indeed, by myopically focusing on what it perceived to be the dispositive issue under **Franks v. Delaware, 438 U.S. 154 (1978)**, the Court of Appeals obviously regarded this all important issue to be: whether the affiants themselves lied in their Affidavit. In doing so, the Court ignored the fact that *if* the alleged informant *lied*, then his lies could be imputed to the affiants. Also, the Court failed to reckon with the fact that the critical, indeed the indispensable, basis for the search warrant itself, was the statement allegedly made by the informant that he had seen drugs on the premises.

So postured, any reliance by the affiants, or the Court that issued the warrant, on this alleged statement cannot be defended. This follows since it truly cannot be said with any degree of impunity that the alleged informant actually told them he had seen any drugs other than the two rocks supposedly purchased on the premises. To rule otherwise, the Court has to distill the conclusion that he did so from the nebulous testimony of the affiants set forth above (**ante, pp. 4 to 5**).

ARGUMENT NO. III

DUE PROCESS WAS DENIED WHEN A TRIAL COURT (FOR AUGHT THAT APPEARS) ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES AND WHEN HE CREDITED A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY EVIDENCE, MOST OF IT REMOTE, IN HIS DETERMINATION THAT THE AFFIDAVIT SET FORTH PROBABLE CAUSE.

In this case the evidence showed those identified as the

alleged sellers did not participate in the two (2) specific drug sales recited in the affidavit. This testimony was uncontradicted. So postured, we are left without any basis as to why the trial Court rejected their testimony.

In assailing this glaring fault in the Court's rejection of the Motion to Suppress, we recognize the law to be that the Court was required to give meaningful consideration to all the evidence. In doing so, the Court was likewise required to pass on the credibility of all the witnesses and he was suppose to draw reasonable inferences from all the evidence. So postured, it follows that in assessing the credibility (of the witnesses) and in weighing the evidence, the Court clearly was bound by those rules which relate to the acceptance of unrebutted evidence. Here, logic dictates that where the testimony provided by a witness is not contradicted by sworn testimony (the case here) or by the circumstances involved, and the testimony provided was not impeached (also the case here) *and* such testimony was not inherently improbable, then clearly that testimony cannot be rejected with impunity.

What must be understood here is that even if the Court felt the testimony of the defense witnesses (who denied that these sales ever occurred) was, in his judgment, suspect, it is still a fact that there was no evidence from which the Court could have concluded these witnesses were not credible. It follows then that the Court's ruling being contrary to the weight of the evidence could not be accepted or validated by the reviewing court, as it was, as being dispositive. Next, even if we suppose that the Court actually determined that the testimony they provided was wholly devoid of credibility, this Court could only consider itself bound by that determination if there was a factual basis for this position in the Record. Stated another way, if it is the law that judgment made by a trial Judge will not be reversed on appeal by a reviewing court as being against the manifest weight of the evidence when that judgment is supported by some competent evidence, **Seasons Coal Co. v. Cleveland, 10 Ohio St. 3d 77**

(1984), then clearly this logic applies when the reverse is true.

What distills from the above showing is the fact that where unimpeached testimony in support of a proposition is not contradicted and such evidence is not inherently improbable, that testimony cannot be arbitrarily disregarded by the Court. Granted, the law in Ohio on this issue is certainly not as clear as it is elsewhere. Still it only makes sense that even in Ohio, the circumstances under which a trier-of-fact may disregard uncontradicted and unimpeached testimony are severely limited. Logic and common sense dictate that for a Court to reject (as was apparently done here) the testimony of the two defense witnesses, the position here being taken is that the Court could only do so on the basis of some contrary evidence.

CONCLUSION

For the foregoing reasons, the *Petition For Writ Of Certiorari* should be granted and the case set for Briefing and argument this term.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	CASE NO. 95 C.A. 140
	)	
LESTER SCOTT,	)	OPINION
	)	
Defendant-Appellant.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court Case No. 94 CR00351
JUDGMENT:	Conviction affirmed, cause remanded for further proceedings
APPEARANCES:	
For Plaintiff-Appellee:	Paul J. Gains Prosecuting Attorney Janice T. O'Halloran Assistant Prosecutor Mahoning County Courthouse

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Youngstown, Ohio
44503

For Defendant-Appellant:

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Cleveland, Ohio
44113

JUDGES:

Hon. Gene Donofrio
Hon. Edward A. Cox
Hon. Cheryl L. Waite

Dated: March 9,1998

DONOFRIO, P.J.

Defendant-appellant, Lester Scott, appeals a jury decision from the Mahoning County Court of Common Pleas in which appellant was found guilty of possession of criminal tools and drug abuse, violations of R.C. 2923.24 and 2925.11, respectively. Appellant was initially sentenced to serve one year on each of the two counts, and ordered to pay a $1,500 fine plus costs. Following a motion for reconsideration, however, the trial court judge suspended appellant's one year sentence and placed appellant on probation for three years. Appellant was also ordered to perform one day a week of community service for one year.

On March 20, 1994, three different apartments on Otis Street, Youngstown, Ohio, were searched by the Youngstown Police Department pursuant to a search warrant issued by Municipal Judge Louis K. Levy. The search warrant was issued based on the affidavit supplied to the court by Youngstown police officers Robert Patton and Terence Russo. The search uncovered, among other things, approximately 6.6 grams of cocaine, two Realistic hand held scanners, twelve Realistic headset radios, and one Uniden Bearcat scanner. The radio equipment was allegedly used for the purpose of criminally relaying messages between apartments in the vicinity regarding the arrival and departure of drug buyers and the police.

Appellant was subsequently charged with possession of criminal tools and drug abuse. On May 10, 1994, appellant entered a plea of not guilty. On June 7, 1994, appellant filed a "MOTION TO DISCLOSE [THE] IDENTITY OF [THE] INFORMANT" and a brief in support, which was subsequently denied. On March 14, 1995, appellant filed a motion to suppress the fruits of the March 20, 1994 search alleging said property was the product of an illegal search. In his March 14, 1995 motion, appellant also requested the return of all "illegally seized" property. Pursuant to Franks v. Delaware (1978), 438 U.S. 154,

98 S. Ct. 2674, 57 L.Ed. 2d 667, a hearing was held on April 3, 1995, on appellant's motion to suppress. See infra. On April 6, 1995, the trial court issued a judgment entry overruling appellant's March 14, 1995 motion to suppress. Following a trial to a jury, appellant was found guilty of possession of criminal tools and drug abuse.

On June 21, 1995, appellant timely filed his notice of appeal.

In his first assignment of error, appellant avers that:

> "THE COURT ERRED WHEN IT RULED THAT A SUBSTANTIAL BASIS EXISTED FOR THE ISSUANCE OF THE SEARCH WARRANT IN THIS CASE."

The basis for the issuance of the search warrant of the premises in question was an affidavit supplied by Youngstown patrolmen Robert Patton and Terence Russo. In the affidavit, the patrolmen attested to the following:

> "1. During the Month of October, 1993, Officers Robert Patton and Terence Russo of the Youngstown Police Department Special Investigation Unit, began to receive complaints from concerned citizens who lived in the area, complaining of illegal drug sales from apartments 254 and 255 Otis, Building 1225, involving the Scott brothers, Lester and Alex.
>
> "2. Also, during the Month of October, 1993, Officers Patton and Russo were approached by a reliable informant who advised Officers that numerous members of the Scott family *** were involved in selling crack cocaine from three different apartments on Otis St., namely apartments 254, 255 and 261. The informant further advised Officers that the informant could purchase cocaine from all three of the said residences.

"3. Beginning in the Month of January, 1994, and continuing to the present date, Officers have received intelligence information from the P.O.S.S.E. Unit comprised of Youngstown Police Officers, that Lester and Alex Scott engaged in large scale drug sales from 1225 Otis, #254 & 255 and 1183 Otis, #261. Included in said intelligence information, the P.O.S.S.E. Unit reported that the Scott's are using several look outs *** who are equipped with Realistic two way radio head sets to broadcast to apartments, 254, 255 and 261, the arrival and departure of drug buyers and Police Officers.***

"4. Based on the above, Officers initiated an investigation and conducted random surveillance at 254 Otis. During the surveillance, Officers observed subjects enter the residence, stay a short period of time and leave. Such activity being common in the illegal sales of narcotics.

"5. During the week of November 01, 1993, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 1225 Otis #254 under the controlled conditions to wit: Officers met with and searched the informant with negative results. Officers the (sic.) kept the informant under constant observation to and from the location. Upon returning, the informant turned over to Officers, one baggie containing one rock of crack cocaine.

"6. During the week of November 01, 1993, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 12[2]5 Otis, Apt. #254 under the same controlled conditions described in the previous paragraph. Upon returning, the informant turned

over to Officers, one baggie containing crack cocaine.

"7. The cocaine purchased during the week of November 01, 1993, was made from a F/B subject, described as, 5'1", 120 lbs., age 23, known to the informant as, Crystal Scott. The cocaine purchased during the week of March 14, 1994, was made from a F/B subject, described as, 5'5", 160 lbs., age 50, known to the informant only as, Bert.

"8. The exact dates of the cocaine purchases cannot be lsited (sic.) as they may reveal the identity of the informant.

"9. All the cocaine was field tested with positive results and has been sent to Tri-State Labs to be further analyzed.

"10. The informant has been proven reliable in the past by supplying Officers with information leading to the arrest and conviction of Ronnie Law, Docket 92-949 and Ruby Penson, Docket 92-944, for drug offenses.

"***

"12. The informant has been to 1225 Otis #254 in the past 72 hours and observed cocaine on the premises.

"Based on the above, Affiants have reasonable cause to believe that the above premises is being used to store and/or for the trafficking of narcotics of abuse. All in violation of Chapters 2925 and 3719 of the Ohio Revised Code."

Appellant challenged the veracity of the facts set forth in the warrant affidavit and was afforded a hearing pursuant to Franks, supra. See infra. During the April 3, 1995, Franks hearing, the following was elicited: 1) Officers Patton and Russo both testified, concerning the surveillance of appellant's premises,

that they had randomly driven past the premises on at least forty occasions, that they saw persons coming and going, and that it was their belief that such activity was consistent with drug trafficking. (Tr. 11-14, 51-55). Officer Patton went on to testify that no effort was made to record the license plate number of any of the cars, that no pictures were taken of any people coming and going, and that the officers did not record times or dates of said events. 2) Officer Patton testified that intelligence was given to him by a group called the P.O.S.S.E., but was unable to verify a source of the information. (Tr. 15). 3) Officer Patton stated that he debriefed the informant after the controlled buy, but did not get a written statement from the informant. (Tr. 19). 4) Officer Patton testified that the informant was on the premises sometime within seventy-two hours prior to the search and had "seen some drugs there." Officer Patton went on to testify that the informant didn't say, and Officer Patton didn't ask, what quantity of drugs the informant had seen, but did state that it was crack cocaine. Officer Patton also conceded that the affidavit did not make the distinction that the informant purchased the drugs within seventy-two hours prior to the search. (Tr. 25). 5) Officer Patton testified that the affidavit did not include the fact that the informant was paid $20 for his services. (Tr. 28). Officer Patton testified that the informant was convicted of at least two felonies and one misdemeanor, which were not included in the affidavit. (Tr. 33-34). 6) Officer Patton testified that during the course of his relationship with the informant that he had no reason to doubt the informant's veracity or to suspect misrepresentations. (Tr. 43-44). 8) (sic) Officer Russo testified that, to his knowledge, the affidavit did not contain any false statements, and that there was no attempt to mislead or misrepresent anything to Judge Levy. (Tr. 67, 69). 9) Crystal Scott testified that she never sold drugs to anybody out of Apartment 254. (Tr. 96). 10) Alberta McGauley testified that she never sold drugs to anybody out of Apartment 254, or from anywhere else. (Tr. 99).

Appellant argues that the trial court erred in finding that

the magistrate had a substantial basis for concluding that probable cause existed to uphold the warrant. Appellant states that "*** the total absence here of any corroboration for the information supposedly supplied by the various alleged sources is, and was, critical." Specifically, appellant points to the "hearsay information supposedly supplied by the organization dubbed the P.O.S.S.E. and others."

Appellant also argues that the information concerning the purchase of drugs by the informant was shown to be false, that such false statements must be stricken from the affidavit, and that without said statements, a substantial basis did not exist for the search warrant. Appellant rests his conclusions on Ms. Scott and Ms. McGauley's statements that the sales did not occur. Appellant also argues that the "alleged informant" was acting as an agent of the police, that the informant's statements were shown to be false by appellant, and that said "falsity" must be imputed to the affiants. Appellant cites United States v. McAllister (7 Cir. 1994), 18 F.3d 1412, in support.

In State v. George (1989), 45 Ohio St. 3d 325, syllabus, the Ohio Supreme Court stated:

> "1. In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' ***
>
> "2. In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate,

neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant."

In State v. Roberts (1980), 62 Ohio St. 2d 170, at 177-178, the Ohio Supreme Court found that:

"In Franks v. Delaware (1978), 438 U.S. 154, the United States Supreme Court squarely addressed the issue of when a defendant, under the Fourth Amendment, is entitled to a hearing to challenge the veracity of the facts set forth in a warrant affidavit after the warrant has been issued and executed. The court, at pages 155-156, summarized its holding as follows:

"'*** [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, requires that a

hearing be held at the defendant's request. ***'

"A defendant who seeks to overcome the presumption of validity accorded a warrant affidavit by making a substantial preliminary showing of a knowing, intentional, or reckless falsity, has, under Franks, supra, the task of supporting his allegations by more than conclusional accusations, or the mere desire to cross-examine. Instead, a challenge to the factual veracity of a warrant affidavit must be supported by an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim. This offer of proof should include the submission of affidavits or otherwise reliable statements or their absence should be satisfactorily explained. Even if the above is established, the court in Franks stated that an evidentiary hearing to review the validity of the search warrant is not mandated by the Fourth Amendment if, after the affidavit material (sic.) alleged to be false is excluded from the affidavit, there remains sufficient content in the affidavit to support a finding of probable cause."

In State v. Waddy (1992), 63 Ohio St. 3d 424, at 441, the court stated:

"*** To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.' *** 'Reckless disregard' means that the affiant had serious doubts of an allegation's truth."

Crim.R. 41, which controls the issuance of search warrants, states in pertinent part:

> "(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished."

The first step of our analysis is to determine whether or not the magistrate had a substantial basis for concluding that probable cause existed. Based on a review of the affidavit, we conclude that he had. The affidavit supplied sufficient information that drug activity was being conducted on the premises in question. The affiants, Officers Patton and Russo, attested that a reliable informant and a member from the P.O.S.S.E. Unit had both advised the officers that drugs were being sold from the premises. The officers also attested that they had conducted random surveillance and had observed activity that

is consistent with drug sales. The officers stated that a reliable informant had twice, under controlled conditions, purchased crack cocaine from the location, and that the informant had observed cocaine on the premises within seventy-two hours prior to the issuance of the warrant. Thus, the magistrate did have a substantial basis for concluding that probable cause existed.

Next, we must determine whether appellant has overcome the presumption of validity accorded to a facially sufficient search warrant by showing that the affiants made false statements, either intentionally, or with reckless disregard for the truth. Franks, supra, at 155-156, 2676, 762 (sic).

During the Franks hearing, appellant elicited that the affiants did not document their surveillance, failed to get a written statement from their informant, and could not specifically state who from the P.O.S.S.E. Unit relayed the information that drug sales were being conducted on the premises. However, appellant neither proved that any statement in the affidavit was false, nor that the affiants made a false statement intentionally or with reckless disregard for the truth.

Appellant focuses on the fact that appellant had provided sworn statements from Ms. Scott and Ms. McGauley stating that they did not sell drugs from the premises. Appellant believes that this shows the falsity of the informant's statements and that said falsity should be imputed to the affiants. Appellant, however, is incorrect in his primary assertion that he has shown the informant's statements to be false.

> "'[T]he weight of the evidence and credibility of witnesses are primarily for the trier of the facts. *** This principle is applicable to suppression hearings as well as trials.'" State v. Dunlap (1995), 73 Ohio St. 3d 308, 314, quoting State v. Fanning (1982), 1 Ohio St. 3d 19, 20.

In determining manifest weight of the evidence questions, appellate courts must remember that "*** the weight to be given to evidence and the credibility of witnesses are primarily for the

trier of facts." State v. DeHass (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. Deference must be given the findings of the trial court because the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use those observations in weighing the credibility of the proffered testimony. Furthermore, the trier of fact is entitled to believe or disbelieve any witness. State v. Antill (1964), 176 Ohio St. 61. See also State v. Baker (1993), 92 Ohio App. 3d 516, 538.

It is obvious that the trial court did not find credible Ms. Scott's or Ms. McGauley's statements. This was well within the trial court's discretion. The trial court had evidence before it, through the affidavit of Officers Patton and Russo, that Ms. Scott and Ms. McGauley had sold drugs to the informant from the premises. Furthermore, based on the totality of the circumstances, the trial court could find Ms. Scott's and Ms. McGauley's statements to be fabricated and self-serving.

Appellant had the burden of proof at the Franks' hearing. See Franks, supra. Ms. Scott's and Ms. McGauley's statements were not found to be credible. Consequently, appellant did not meet his burden of proof.

Appellant's first assignment of error is found to be without merit.

In his second assignment of error, appellant contends:

> "THE COURT ERRED WHEN, IN ARTICULATING THE ESSENTIAL FINDINGS REQUIRED BY RULE 12(E), OHIO RULES OF CRIMINAL PROCEDURE (FOR AUGHT THAT APPEARS), HE ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES, AND WHEN HE FAILED TO REJECT A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY AVERMENTS IN HIS DETERMINATION AS TO WHETHER

THE AFFIDAVIT SET FORTH PROBABLE CAUSE." (Emphasis sic.)

Appellant directs this court's attention to the affidavits and testimony offered by Ms. Scott and Ms. McGauley. Appellant states that "*** where testimony and support of (here) a Motion to Suppress is offered and the testimony is not contradicted (either by positive testimony or by circumstance) and such evidence is not inherently improbable and the witness providing such evidence was not impeached, that testimony cannot be arbitrarily disregarded by the Court." Thus, appellant concludes, the trial court's decision as to whether probable cause existed was against the weight of the evidence.

As discussed in assignment of error one, the weight of the evidence and credibility of witnesses are primarily for the trier of fact, and the trier of fact is entitled to believe or not believe a witness' statements.

Crim.R. 12 (E) provides in pertinent part:

> "(E) Ruling on Motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.
>
> "***
>
> "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

In its April 7, 1995 findings of fact and conclusions of law, the trial court found:

> "After review of said warrant and the testimony of all the witnesses, it is clear that in the Affidavit in support of the Search Warrant neither officer included any false statement knowingly or intentionally, nor did either officer make any statement with reckless disregard for the truth.
>
> "***
>
> "The Defendant [appellant] failed to meet the

burden of proof by a preponderance of the evidence as required to prevail on his Motion to Suppress."

The trial court obviously chose to disbelieve the testimony of Ms. Scott and Ms. McGauley, which it was entitled to do. See Baker, supra, and Assignment of Error One. Consequently, as the burden of proof was on appellant, see Frank, supra, the trial court's decision to disbelieve appellant's witnesses and find that appellant had failed to meet his burden of proof is not against the manifest weight of the evidence. See also Assignment of Error One, supra.

Appellant's second assignment of error is found to be without merit.

In his third assignment of error, appellant contends:

"THE COURT ERRED WHEN IT FAILED TO ORDER THE RETURN OF ILLEGALLY SEIZED PROPERTY."

Appellant recognizes that the search warrant authorized that appellant be brought into custody. Appellant argues that he was arrested while driving a van, that the van was not designated as a place to be searched, that the police had neither probable cause or the authority to search the van, and that any property found in the van was illegally confiscated. Appellant argues that a "considerable quantity of money" was found during a search of the van.

Appellant's contention that a "considerable quantity of money" was taken from the van is not disputed by appellee. Appellee, in its brief, states:

"Appellant, also, refers to a large sum of money which was confiscated by officers during the search of his van. Federal agents inventoried and retained this money pursuant to a federal civil forfeiture action." (Appellee's brief, page 13)

Furthermore, a t the April 3, 1995 hearing on appellant's motion to suppress, during the cross-examination of appellant involving

the stop of the van, the prosecuting attorney asked the following:

"Q You were going to go to the Youngstown Airport; right?

"A Yes, I was.

"Q Were your tickets already purchased.

"A Yes, sir, right in my pocket.

"Q You were going to go to where, Toronto?

"A Yes.

"Q You were going up on vacation up there?

"A I was going to visit Shauna's father.

"Q And how long was that visit going to be for?

"A I don't know how long it to be. I didn't decide.

"Q And for that visit you were taking about $53,000 in cash with you; right?

"A No, I wasn't.

"Q You had $53,000 with you in the van?

"A Sure.

"Q Where did that money came from where?

"A It came from my - - it came from the 'Dare to Dream' organization. ***" (Emphasis added.)

The inventory list in the record, however, only reveals that $1,000 of United States currency was seized from the apartment on Otis Street and that $1,810 in United States currency was seized from appellant's person. Although it appears undisputed that authorities had confiscated $53,000 from the van appellant was driving, there is no inventory of this confiscation.

A further review of the record indicates that the trial court did not address this issue in its decision or in its findings of fact and conclusions of law. Therefore, this court cannot fully address appellant's third assignment of error.

The trial court's decision is hereby affirmed in part and remanded in part. This cause is hereby remanded to the trial court

to determine 1) the current location of the $53,000 taken from the van; 2) whether the $53,000 taken from the van was illegally seized; and 3) whether the $53,000 taken from the van should be returned to appellant.

Cox, J., concurs

Waite, J., concurs

APPROVED:

s/_____

Gene Donofrio

Presiding Judge

STATE OF OHIO	IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY	SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	CASE NO. 95 C.A. 140
	)	
LESTER SCOTT,	)	JOURNAL ENTRY
	)	
Defendant-Appellant.	)	

For the reasons stated in the opinion rendered herein, the first and second assignments of error are found to be without merit and overruled. Conviction affirmed. Based on the record before this court, we cannot address the third assignment of error. It is the final judgment and order of this Court that the judgment of the Common Pleas Court of Mahoning County, Ohio, is affirmed and this cause is remanded to determine: 1) the current location of the $53,000 taken from the van; 2) whether the $53,000 taken from the van was illegally seized; and 3) whether the $53,000 taken from the van should be returned to appellant. Costs to be taxed against appellant.

s/_____

s/_____

s/_____
JUDGES.

The Supreme Court of Ohio

1998 Term

State of Ohio,	:	
Appellee,	:	Case No. 98-791
v.	:	ENTRY
Lester Scott,	:	
Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by James R. Willis, Esq.

(Mahoning County Court of Appeals; No. 95CA140)

s/_____
THOMAS J. MOYER
Chief Justice

Filed July 1, 1998

Appendix "B"

Supreme Court, U.S.
FILED
DEC 23 1998
OFFICE OF THE CLERK

NO. 98-894

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS SEVENTH JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In January, 1993, the Youngstown Police Department (hereinafter YPD) received complaints about drug dealing in the Westlake Housing Project, specifically at 1225 Otis Street, Apartments 254, 255 and 261, Youngstown, Mahoning County, Ohio. Lester Scott and his fiancé resided in Apartment 254. As part of its investigation, YPD conducted random surveillance which indicated that a constant flow of people entered and exited the apartments after staying only a few moments. This type of traffic is consistent with the drug trade. "P.O.S.S.E.", an intelligence unit comprised of police officers, supplied the YPD officers with information that there were several look-outs who used headsets and other equipment. All of his activity is consistent with the drug trade.

Two investigating officers met with a confidential informant who had previously provided information that successfully led to two other convictions. After searching the informant to make sure that he had no drugs, weapons or other

articles which would compromise a controlled drug buy, the YPD officers sent the informant to one apartment in an attempt to purchase drugs. He was kept under surveillance. After returning to the officers, the informant turned over a bag containing crack cocaine. This first controlled-buy took place in November, 1993; a subsequent controlled-buy took place in March, 1994. On each occasion, the informant purchased drugs from women identified as Crystal Scott and Alberta MacGauley.

As a result of these occurrences and 72 hours after the second controlled-buy, the officers requested a warrant to search the three apartments that had been under surveillance on Otis Street. Based on the information gathered by the police as well as the drug-buys in November, 1993 and March, 1994 that indicated the presence of drugs on the premises, a search warrant was issued to YPD.

YPD officers saw Petitioner and his fiancé driving in the neighborhood and informed them that their apartment was being searched. Petitioner and his fiancé returned to their apartment in

order to be present during the search. Petitioner directed the police officers to the location of cocaine on the premises. The police also discovered criminal tools consisting of headsets and a police scanner. In addition, the police confiscated a large number of weapons, papers in the Petitioner's name, a pager and banking paraphernalia.

Lester Scott was arrested on or about March 20, 1994. He was indicted on charges of possession of criminal tools, pursuant to O.R.C. §2923.24, and drug abuse, pursuant to O.R.C. §2925.11(A)(C)(1). He filed a Motion to Suppress the evidence seized from his premises arguing an insufficient basis existed for the issuance of a search warrant. This Motion was heard on October 4, 1994 and overruled. Lester Scott's subsequent trial ended in a mistrial. The new trial date was set and Petitioner filed another Motion to Suppress on March 14, 1995. A Franks hearing was held April 3, 1995. The trial court, again, overruled Petitioner's Motion to Suppress on the basis that there was probable cause for the issuance of the search warrant and because

the trial court concluded that the police officers obtaining the search warrant had neither lied nor acted with reckless disregard for the truth. The evidence was, therefore, admitted and Petitioner was convicted of the aforementioned charges. Petitioner was sentenced on each of the two counts. The Seventh District Court of Appeals affirmed this conviction on March 9, 1998. The Ohio Supreme Court denied Scott's leave to appeal and dismissed the appeal to that court on July 1, 1998.

REASONS FOR OPPOSING WRIT

I

THE SEARCH AND SEIZURE WARRANT ISSUED DID NOT VIOLATE THE ACCUSED'S DUE PROCESS RIGHTS SINCE PROBABLE CAUSE SUPPORTED THE WARRANT.

The Appellant's disdain of the legal process in criminal proceedings, does not present a valid argument to support his apparent claim that probable cause did not support the issued search warrant. In his first claim, Scott argues that hearsay improperly supported the approval of the search warrant.

Scott's arguments misconstrue the law and fail to provide

a foundation for this Court's review. Probable cause must support the issued warrant. Franks v. Delaware (1978), 438 U.S. 154. "Probable cause is a practical nontechnical conception." Brinegar v. United States (1949), 338 U.S. 160, 176. The judge issuing the search warrant must determine if the facts submitted provide a substantial basis to believe there is probable cause. Illinois v. Gates (1983), 462 U.S. 213, 238. A reviewing court owes "great deference" to the opinion of the judge issuing the warrant. Id. at 236. Clearly, the determination of probable cause is not proof beyond a reasonable doubt. "The task of the issuing magistrate is simply to make a practical common sense decision whether given all the circumstances set forth in the affidavit before him...there is a fair probability that contraband or evidence will be found in a particular place." Id. at 238. Probable cause requires that there is "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged...." Portis v. Trans Ohio Savings Bank (1988),

46 Ohio App. 3d 69 paragraph 3 of syllabus. While the Appellant clearly disapproves of the use of hearsay to support a search warrant, this Court has held that an affidavit supporting a search warrant may be based upon hearsay information. Aguilar v. Texas (1964), 378 U.S. 723, 729.

Scott challenges the facts in the affidavit by pointing to the affidavits and testimony of Crystal Scott and Alberta MacGauley. Scott argues that these two women denied selling drugs; he points to the affidavit which indicates that drugs were sold by these two women. As a result, he claims that there was no probable cause to support the search warrant.

Scott misconstrues the burden placed upon him by this Court in Franks v. Delaware (1978), 438 U.S. 154. In Franks, this Court ruled that an appellant could challenge the warrant affidavit if he made a substantial preliminary showing that the affiant had intentionally or recklessly included a false statement in the warrant affidavit and the false statement was material and necessary for a finding of probable cause to issue. Id.

> "A Franks' hearing affords defendant the opportunity to show by a preponderance of the evidence that the warrant affidavit contained perjury or a reckless disregard for the truth. If the defendant meets this burden, the court will set aside that false material contained in the warrant affidavit and if probable cause cannot be established from the valid truthful portion of the affidavit, the entire search is deemed to be invalid and the ensuing search is void."

United States v. McDonald, 723 F. 2d 1288, 1292 (7th Cir. 1983).

The only relevant conduct in a hearing to determine the sufficiency of the affidavit supporting a search warrant is the conduct of the affiant. Franks, supra at 171. Appellant's burden at this hearing is to demonstrate that the police officers obtained the warrant on the basis of information they knew to be false or with a reckless disregard for the truth. Id. "To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made the false statement either intentionally or with reckless disregard for the truth." State v. Waddy (1992), 63 Ohio St. 3d 424, 441.

Scott failed to meet this burden. He presented the court with statements from two women declaring that they did not sell drugs to the confidential informant. In contrast, the police officers indicated that the confidential informant did in fact buy drugs from the two women. This is a question of fact to be resolved. Scott presented no evidence to prove that the confidential informant lied to the police officers or that the police officers lied to the court.

It is well established that "the weight of the evidence and credibility of witnesses are primarily for the trier of facts." State v. Dunlap (1995), 73 Ohio St. 3d 308, 314. Deference must be given to the findings of the trial court because the trial judge is in the best position to view the witnesses, observe their demeanor and use these observations to determine their credibility. Totally overlooked by the Appellant is the well established principal that the trier of fact is entitled to believe or disbelieve any witness. State v. Antill (1964), 176 Ohio St. 61.

Despite the Appellant's objections, a trial court has the

discretion to believe or disbelieve any testimony. In this case, the trial court obviously chose not to believe the affidavits and testimony of Ms. Scott and Ms. MacGauley. As noted by the appellate court, the trial court could easily find their testimony to be fabricated and self serving. As a result, the Appellant did not meet the burden of proof required namely to show that the affiant made a false statement or that these statements were made with reckless or intentional disregard for the truth. As a result, the appellate court below properly affirmed the decision of the trial court.

II
THE RECORD FAILS TO SUPPORT THE CLAIM THAT THE INFORMANT ASSUMED THE STATUS OF AN AGENT OF THE POLICE.

Scott argues without factual basis that the informant became an agent of the state whose remarks can consequently be attributed directly to the state. The test to determine whether an informant is a police agent has two prongs: (1) whether the government knew of or acquiesced in the intrusive conduct and

(2) whether the informant's purpose was to assist law enforcement or to further his own ends. United States v. Feffer, 831 F. 2d 734, 739 (7th Cir. 1987). The law clearly states that the burden is upon the appellant to establish that the confidential informant was acting as a government agent. United States v. Koenig, 856 F. 2d 843, 847 (7th Cir. 1988).

Neither case law nor common sense supports the proposition that:

> "a confidential informant automatically obtains and retains an ongoing status as a law enforcement officer or a government agent for Franks' purposes by virtue of past assistance to the police. It is every citizen's civic duty to do what he can to aid in the control and prevention of criminal activity."

Id. at 850.

Scott merely poses the conclusion without factual basis that the confidential informant became a government agent. It is well settled that his attack must be more than conclusory. United States v. Radtke, 799 F. 2d 298, 310 (7th Cir. 1986).

The Appellant failed to demonstrate either that the

confidential informant made false statements or that the police officers acquiesced in these allegedly false statements. This informant had provided truthful information in the past. The information provided to the police officers by the informant was believable. Scott merely speculates as to the motivations for the informant's participation in the controlled drug buys. The Appellant did not offer conclusive proof at the suppression hearing to support the claim that the informant became a government agent. Finally, even had this proof been offered, noticeably absent from the Appellant's proof is any demonstration that the information provided by the confidential informant consisted of any lies or falsities.

The trial court made a credibility determination of the witnesses which included the police officers as required in a Franks hearing. The focus of this hearing was to determine whether the officers lied or proceeded with reckless disregard of the truth when submitting the affidavit for the search warrant. The Appellant failed in meeting the burden to establish either that

the officers lied or that they proceeded with reckless disregard for the truth. It follows then that the trial court's ruling was not arbitrary, capricious or unreasonable. The trial court did not abuse its discretion. As a result, Scott's claimed error lacks merit.

III
THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT ASSESSED THE CREDIBILITY OF WITNESSES.

The Appellant, obviously dissatisfied with the trial court's finding, asserts that the trial court denied him due process when the court evaluated the testimony of the witnesses at the Franks hearing. Totally ignored by Scott is the fact that the role of the trial court is to assess the weight of the evidence and the credibility of the witnesses. State v. Dunlap (1995), 73 Ohio St. 3d 308, 314. While he repeatedly argues that defense witnesses should have been believed, it is settled, well established law that "the weight to be given to evidence and the credibility of witnesses are primarily for the trier of facts." State v. DeHass

(1967), 10 Ohio St. 2d 230 paragraph 1 of syllabus. It is also well settled law that deference must be given to the findings determined by the trial court. The court is in the best position to not only see the witnesses but also to observe and assess their demeanor. These observations are utilized in assessing the credibility of the testimony. Without question, the trier of fact has the right to believe or not believe any testimony offered. State v. Antill (1964), 176 Ohio St. 61.

Within these perameters the trial court issued its decision placing credence in the testimony of the police officers over that of the defense witnesses. The fact that this occurred does not establish a denial of due process. The burden of proof was placed upon the Appellant at the hearing challenging the search warrant. Franks v. Delaware (1978), 438 U.S. 154. The trial court is not required to believe testimony of defense witnesses. Since the trial court found the defense witness statements not to be credible, the Appellant did not meet his burden of proof. As a result, Scott's position lacks merit.

CONCLUSION

The Appellant's challenge alleging violations of due process rights lacks merit. The basis of his challenge lies in the trial court's decision to give credence to the affidavits and testimony of police officers over the conflicting testimony of defense witnesses. Settled well established law places the discretion with the trial court to believe or disbelieve any witness testimony. The issues and law involved in this case are settled and well established. Consequently, they do not warrant this Court's review.

Certiorari must be denied.

Respectfully submitted,

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NO. 98-894

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The
Ohio Court Of Appeals For The
Seventh Judicial District

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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First off, it should be understood that in the wake of **Franks v. Delaware, 438 U.S. 154 (1978)**, it seems clear from all the reported Ohio cases that the police-affiants in Ohio are all scrupulously honest. For surely if it were otherwise there would be at least one case that was reversed on the basis that a **Franks** violation was found. *See, e.g.*, **State v. Hunt, 22 Ohio App. 3d 43 (Cuyahoga County, 1984)**, and **State v. Dotson, 43 Ohio App. 2d 31 (Cuyahoga County, 1974)**.

Having said that, in this case counsel-opposite tells us the police conducted "random surveillance" of the premises. This, of course, means we only have the officer's word this happened -- as there was no proof that documents any of these alleged surveillances, a fact noted by the Court of Appeals in its Opinion. (*See*, **Appendix, To The Petition For Writ, at p. A-7.)**

Also, the affidavit for the search warrant, centralized herein, shows considerable reliance was placed by the affiants on what was said to have been "intelligence" that had supposedly been provided them by what was described as the "P.O.S.S.E.". The P.O.S.S.E. was said to be a special unit of police officers (**Brief In Opposition, p. 1**). This too was a reference to rank hearsay that had supposedly been furnished the affiant. Significant here, the original source of this information (if indeed there was a source of this intelligence) was not even slightly verified. Indeed when asked to do so, one of the affiants described what was referred to as intelligence as "information received from a believed to be reliable source". In short, these unknown sources were "believed to be reliable" by the P.O.S.S.E. **(Tr., pp. 57-59).**

As to the equally hollow averment in the affidavit that "two investigating officers met a confidential informant who had provided information in the past that led to two other convictions,"

it should be noted that there was nothing alleged in the affidavit which showed the alleged informant in the asserted conviction did anything other than confirm peripheral facts in those investigations.

Granted, the affiant did allege that there were two (2) drug sales. These assertedly involved an insignificant quantity of drugs (the sale of "one rock of cocaine" on one date and a similar quantity four [4] months later). As to these naked allegations of drug sales, the contention was made in the "Motion to Suppress", and repeated on appeal, that these alleged events never happened. Additionally, two females who supposedly made these sales to the alleged informant both submitted affidavits and testified it never happened. Their testimony was not even slightly challenged. Indeed their testimony was not even slightly impeached.

I

Reply To Respondent's Argument No. 1

As to the State's argument that the affidavit set forth probable cause (**Brief In Opposition, pp., 4-9**), we are first given an unnecessary, rather sophomoric, lecture in which certain vintage Fourth Amendment cases are referenced. In the course of this feeble exercise, ultimately we are told that "a question of fact" to be resolved (**id., p. 8**) existed as to whether the affidavits, plus the sworn denials of the two defense witnesses, were sufficient to prove "the confidential informant lied to the police or that the police officers lied to the court" (**State's Brief, p. 8**). In addressing this narrow issue it seems clear counsel is satisfied with maintaining that in this situation it was enough that the police officer "indicated that the confidential informant did in fact [twice] buy drugs from the two women" (**ibid**).

As to all this, we certainly agree with counsel that deference must be given to the findings made by the trial Court, the finder of

the facts in this instance. But this hardly means the trial Court's decision not to credit unimpeached testimony, and to regard it as perjurious simply because it conflicted with some police officer's opinion (of an event he did not witness) provided a basis to believe whatever was opposite to their testimony. And, that was so because it was enough for him that the police chose to believe what some undisclosed, *paid informant* told them.

II

Reply To Respondent's Argument No. II

Where the proof shows the police not only solicited the alleged informant to make, if he could, an alleged drug purchase, but also paid him, for supposedly having done so, the informant must be regarded as an agent of the police. As we see it the law is clear in this regard, as counsel-opposite fully recognized in her critical references to **United States v. Koening** and **United States v. Radtke**. **(Brief In Opposition, p. 10.)** Granted it is significant in these circumstances whether the alleged informant was acting as an agent of the police. Indeed, on this point we do not dispute counsel's reliance on **United States v. Koenig, 856 F.2d 843 (7th Cir. 1987)**. This case counsel cites for the proposition that a "confidential informant does not automatically obtain and retain an ongoing status as a law enforcement officer or a government agent for **Franks'** purposes by virtue of past assistance to the police" **(Brief In Opposition, p. 10)**. On the other hand, in this case we were not talking about *past assistance*, of the type referred to in **Koenig**, upon which the State relied. **(Ibid.)**

Simply put, in **Koenig** itself, the Court made the huge point of noting that "the government should have been required to prove that Federal Express had no intent to assist in the government's enforcement of the criminal laws to avoid having Federal Express

deemed its agent" (**id., 850**).

Next counsel makes the equally bland argument that Petitioner, Lester Scott, "merely poses the conclusion without factual basis that the confidential informant became a government agent" (**Brief In Opposition, p. 10**). Obviously counsel must have missed the showing made in the petition (**pp. 15 to 19**) and in the Record, that revealed the alleged informant had been solicited and paid (**Tr., pp. 28 & 34**) for his alleged services. In other words, despite the fact of these payments counsel still argues that "Scott merely speculates as to the motivations for the informant's participation in the controlled drug buys" (**Brief In Opposition, p. 11**). Even this is not all. It is also being said that even if the proof showed the alleged informant was a police agent "noticeably absent from ...[our] proof is any demonstration that the information provided by the confidential informant consisted of any lies or falsities" (**id., p. 11**).

The problem with counsel's argument is that she fails to reckon with the indelible fact that the informant in this case was not only paid, his actions were fully orchestrated by the officers (**Tr., pp. 18-19, 28 & 34**). These showings bring what happened here within the analysis made by the Seventh Circuit in **United States v. McAllister, 18 F3d 1412 (7th Cir. 1994)**. This case was relied on by Petitioner (as the appellant) in our Court Of Appeals and was cited by that court in its Opinion, (**Opinion p. A-8**). It is again relied on in our Petition. Yet, it was not even cited by the State in its Brief In Opposition.

Significant here, because it was the precise argument rejected by the Court Of Appeals, is the following argument made to that court in connection with our reliance on **McAllister**. Here it was said:

> This point is magnified by another holding made in **McAllister**, which fits our facts like a glove. Here the Court noted that in making the determination as to whether an informant was acting as a government agent (here as a police-agent), the analysis should include a determination as to "whether the informant performed the conduct at the request of the government [the case here] and whether the government offered him a reward [also the case here]" **(18 F.3d, at pp. 1417-1418).** Also see **United States v. Pritchard, 745 F.2d 1112 (1984).**
>
> Even this is not all. It was also established here that clearly this informant's conduct can be contrasted with that of those informants who assist the police to further their "own interest in hope of increasing his chances of receiving favorable treatment in the handling of his own pending drug charges" **(McAllister, 18 F.3d at p. 1418).** Rather, his purpose was to assist the police, a service he performed for pay. With this being so, the fact that it was shown the informant lied requires that the lies told by him must be imputed to the affiants.

Appellant's Brief, pp. 29-30, filed (below) in the Ohio Court Of Appeals.

Postured then by these various undeniable showings, which provide appropriate and unassailable premises for the contentions made in the above quote, there is really no way this Court should be convinced it is excusable for the Ohio Courts to fail to articulate, in meaningful prose, a resolution of this issue. This is particularly so since the issue was postured for them, as it has been for this

Court, in our Petition, pp. 15 to 17, and in this Reply. On the other hand, what these failures show is that the Ohio Courts continue to exhibit in this case the same type of wrongheadedness that was summarily dealt with in **Smith v. Ohio, 499 U.S. 541 (1990)**.

III

Reply To Respondent's Argument No. III

Counsel's response to our serious accusations, made in our Argument No. III (that the trial court had, *inter alia,* arbitrarily and without any justification rejected the testimony of certain central witnesses), is still another example of a gross failure to identify, and comprehend, an issue and deal with it below its surface. To begin with, no one denies the trial judge, as the first-finder, was empowered to evaluate the credibility of the witnesses. This is so regardless of who presents the witness in support of their respective positions.

However, in this case counsel-opposite truly misses the point when she cast the issue as, in effect, being a swearing contest as between the Petitioner's two witnesses, who swore (both in their affidavits and their testimony) they did not sell drugs (to anyone, including the alleged, arguably phantom informant) *and* the police officer-affiants, who had orally "indicated that the confidential informant did buy drugs from the two women" (**Brief In Opposition, p. 8**).

Here it should be understood, one of the officers fully admitted "the informant did not write out a statement" for them (**Tr., pp. 18-19**). According to this witness, it happened that way because they "did not feel it was necessary," as there was no intent on their part that "he [the alleged informant] was going to give testimony in a courtroom against the individual he made the

purchase from" (**ibid**). As we see it the resolution of this credibility issue against Petitioner is really brought into focus by the above showing. This follows because even if we concede the existence of this alleged informant, and fully credit him with having told the officers he made these isolated purchases, the fact that they believed him can hardly be a sufficient basis for the rejection of sworn, unimpeached testimony.

Obviously then, even if the officers had been lied to by their agent and that lie was merely passed on to the court that issued the warrant, the situation would be no different if the affiants had themselves lied.

With this being so, telling us the trial court chose not to believe the two defense witnesses, and rejected their unimpeached testimony as not being "credible," hardly justifies the further, indeed specious, argument made -- *i.e.*, that the trial judge "issued his decision placing the testimony of the police officers over that of the defense witnesses" (**Brief In Opposition, p. 13**). Having said that, so that there can be no misunderstanding, what we are really being told here is a trial judge is free to reject and disregard testimony that is not even challenged as having been impeached and was not challenged as being perjurious or even implausible. Surely Fourth Amendment issues cannot be so resolved by a state court in such a cavalier fashion.

CONCLUSION

In our judgment given the fact that the officers fully admitted there was no way for them to verify whether their informant had actually purchased any drugs from the people named, and that they "had relied on the informant" (**Tr., pp. 70-71**), it follows that in this case probable cause was predicated on what, at best, must be viewed as an insubstantial basis. While that is bad

enough, the fact that the Courts in Ohio were so obviously willing to look the other way verifies our belief that they are truly convinced that certain people in our inner-cities do not possess any rights the police are bound to respect. *Cf.* **Scott v. Sandford, 60 U.S. 393, 407-408 (1856).**

As we see it, this case fully demonstrates just how far some of our judges are willing to go in these areas where we virtually have a brand of undeclared Martial Law.

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